

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
HALON DROZD, et al., : Docket #1-17-cv-00922-
 : RMB-KHP
 :
Plaintiffs, :
 :
- against - :
 :
340 WEST 46TH STREET CORP., et al, : New York, New York
 : October 2, 2017
Defendants. :
----- :

PROCEEDINGS BEFORE
THE HONORABLE JUDGE KATHARINE H. PARKER,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

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<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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THE CLERK: Calling case 17-civil-922, Drozd v.
340 West 46th Street Corp.

HONORABLE KATHARINE H. PARKER (THE COURT): All
right, will counsel please make their appearances for the
record?

MR. LOUIS PECHMAN: Good morning, Judge. Louis
Pechman, Laura Rodriguez and Gregory Slotnick from Pechman
law Group for plaintiffs.

THE COURT: Good morning.

MR. JESSE GRASTY: Good morning, your Honor.
Jesse Grasty and Jane Jacobs from Klein, Zelman, Rothermel,
Jacobs & Schess for defendants.

THE COURT: Good morning.

All right, I called this conference because the
parties seem to have a contentious dispute about remaining
discovery, and particularly the reopening of the deposition
of one of the defendants, is that right?

MR. PECHMAN: Yes, your Honor.

THE COURT: So Mr. Pechman will be speaking on
plaintiff's behalf, right?

MR. PECHMAN: I'll take this one, your Honor.

THE COURT: Okay. So tell me why do you need to
reopen the deposition, and help me to understand why this
is needed for summary judgment purposes?

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MR. PECHMAN: Well, for purposes of summary judgment and also for purposes -- for trial. Obviously, it's important to know whether someone had an ownership interest in the restaurant. In particular, defendants paint a picture of Marcel Denamiel, who we understand is a former owner of the restaurant, as somebody who just hangs out in the restaurant 60 hours a week with no compensation. As it turns out, from our point of view, he's there, he's active, he's managing, he's assigning people, he's hiring all the plaintiffs. Why is that important issue? Of course, for personal liability. Marcel happens to own a couple of buildings in Manhattan unencumbered by mortgages. It's important for us in terms of -- for liability purposes.

So what we have, incredibly, at the deposition of his son, Paul, we said, "Was Marcel ever the owner?" He said no. Now, that's important. Defendants will have you believe that, well, all that matters is the past six years for statute of limitations. Why is it important? Because they weave this incredible tale that he does nothing in the restaurant, has no authority, none of the attributes of somebody who's an employer under the Fair Labor Standards Act. And it's our contention -- and there's a few things we are going to be asking your Honor to compel them to

1 provide -- is that at the point in time that he started
2 collecting Social Security, they just paid him cash. Well,
3 what makes us believe that? Well, the accountant said he
4 started drawing a salary at that particular time, his hours
5 didn't change, he continued to do the same work, the same
6 performance; and, as we found from the accountant, at a
7 certain point in time, Paul was also skimming \$350,000 a
8 year in cash from the restaurant.
9

10 So the notion that dad, who owned the restaurant,
11 is just hanging out for 60 hours a week, not getting any of
12 that \$350,000, and not having any responsibility is really
13 blown away by the fact that he used to own the place and
14 he's doing the same thing, and where did all that cash go.
15 So for a number of reasons, we obviously didn't know that
16 at the time. Silly us, we took somebody at their word that
17 the father never owned the restaurant; that it's something
18 that, look, if I owned a restaurant on Restaurant Row and I
19 had a 50% interest, it wouldn't have been something that
20 slipped my mind. It wouldn't be particularly in this
21 situation.

22 So it's a blatant lie. It goes to the heart of
23 liability for the father. It goes to the heart of
24 liability in terms of what the transition was. And unless
25 they want to stipulate that Marcel is an employer for

purposes of the Act, that information is critical.

Now, with respect to summary judgment, we need to tie it up. We can't have a loose end based on somebody's faulty memory, "Oh, I guess my dad was never the owner; we never were 50-50 owners." We can't have that if we're making a motion for summary judgment. They could just say, "Well, this is the deposition transcript."

So what we want to do is we want to make a motion for summary judgment, and we want to have the employer liable. We don't have to have a trial on this if we can establish certain critical facts. And one of those critical facts is was Marcel ever the owner. Now, what defense counsel has done is they made an objection when we asked for documents about the ownership interest. They came up with, "Well, it's a time-limited case. You can only go back for the past six years. You can't go back before." Obviously, there's no basis for that. I think what we need from the Court, in addition to reopening the deposition, is one, we need those documents in terms of corporate ownership: what was the transfer, what happened, who owned what, who were the corporate officers. Those are documents that should be readily producible and should have been produced already.

THE COURT: Do you have them for the six-year

1 statute of limitations period?

2 MR. PECHMAN: No. We have no documents at all in
3 terms of ownership.

4 And there is a tax form, 1225-E, which they did
5 provide for one of the years. So they should go back and
6 plus 25E, the amount of tax may even -- might, as
7 understand it, it lists income from the corporation, and it
8 would be another way to identify who was the owner. That's
9 an easy enough thing for them to do.

10 Now, their accountant, Marcel's accountant, Paul's
11 accountant, the restaurant's accountant, he said this
12 happened; he said they were 50% owners. He testified what
13 we believe is truthfully. And he had a logical story to
14 tell. Marcel was the 50-50 owner, he went on Social
15 Security, and then he gave up ownership. And what we
16 believe happened was he started getting cash. Along the
17 lines of that, I think it's important -- and defense
18 counsel had directed Marcel not to answer this question at
19 the deposition, and we would like a ruling from your Honor
20 on that on the record today -- we asked how much is the
21 Social Security. And Marcel was directed not to answer by
22 counsel. We think we're entitled, given the circumstances,
23 to know how much that Social Security is. Because,
24 obviously, it's a -- well, he's going to be losing three
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grand a month, if he draws a salary, that's a reason for us to be paying him in cash and letting him just be collecting the Social Security.

THE COURT: Do you have the amount of salary he received prior to going onto --

MR. PECHMAN: No. They gave us a stiff arm on everything. Okay? And it's like trust us even though we're obviously lying. And I don't say that lightly, your Honor.

So for those reasons, we think it's compelling to reopen the deposition; and at the very least, let's have these documents, let's have these documents which prove that Marcel was the owner.

THE COURT: All right, I'll hear next from defendants.

MR. GRASTY: Thank you, your Honor.

It's interesting to hear counsel talk about authority on the subject. He submitted a motion, he submitted a reply; yet, there's no authority that he's cited anywhere why -- that establishes why, if Marcel had ownership -- and I say "if" just to give him the benefit of the doubt here -- if Marcel had ownership in 2003, how that would be relevant to making him an employer under the law in 2011, eight years later. And there's a reason why he

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2 didn't cite any authority on that point, your Honor,
3 because there is none and he has none.

4 You know, he's talking about what Bill Fordagne --
5 that's the accountant that he's referring to -- that
6 Mr. Fordagne testified that Marcel had an ownership
7 interest in 2003 -- 1997 to 2003 is what Mr. Fordagne
8 testified to. I should point out that Mr. Fordagne, A, was
9 testifying from his own memory; he admitted that he had
10 never seen any documents that actually established
11 ownership; he is their former accountant; he's been fired
12 because of really performance-based issues. Also, before
13 deposing Mr. Fordagne, plaintiffs deposed Marcel. And it
14 was both Marcel and Paul who testified that Marcel did not
15 have ownership interest and did not draw a salary since --
16 excuse me -- that he never had any ownership interest and
17 that he has not been paid recently.

18 You know, their focus on the time that he spent at
19 the restaurant, that's interesting to me because that's not
20 anything new. I mean, that's something that they've known
21 all along. Their clients told them that, I'm sure, from
22 day one. And spending time at a location isn't something
23 that makes someone an employer. Throughout the depositions
24 we've repeatedly questioned plaintiffs about what role did
25 Marcel play in the last six years, did he actually hire

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2 someone, did he fire someone; and repeatedly they've said
3 that they can't cite anyone with specificity that they know
4 Marcel hired or fired. They know that -- they can see that
5 Marcel had no role in setting their salaries, that he
6 wasn't involved in setting the schedule. These are all the
7 things that go to establishing employer status, and they
8 have none of that. So there's no reason to reopen Mr.
9 Denamiel, Paul Denamiel's deposition based on information
10 that they already have.

11 As to the tax issue that they've cited, yes, Paul
12 Denamiel had a tax issue. He has filed amended tax
13 returns, and he has repaid all of that money. So there's
14 no money that's hidden or gone anywhere. He's made it
15 right with the government on that front.

16 So we just don't see how this is relevant at all.
17 Again, eight years prior, it doesn't connect in any way.

18 THE COURT: Mr. Pechman, have the plaintiffs
19 testified as to specific roles that Marcel played during
20 the six-year limitation period?

21 MR. PECHMAN: Yes, your Honor. And they've also
22 testified that all these were long-term employees that were
23 hired by Marcel. He -- assigns were his. There's a tape
24 recording where Marcel is discussing the amount of the tip-
25 out to the bartenders and giving his opinion that it should

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2 be 10% rather than 20%; and 10% in fact is what was
3 decided.

4 Now, there wasn't really hires before -- I mean,
5 during the time period, there's some evidence at Marcel's
6 deposition about him interviewing waitresses and what
7 constitutes a good waitress. So there is substantial
8 evidence within the six-year period that he's doing the
9 function of an employer, including the disciplining in
10 terms of hiring, interviewing, that sort of a thing.

11 But the important thing here in terms of the
12 context is he was an owner; he was a 50% owner. And, as
13 everybody testified, his role didn't change. That's pretty
14 compelling. And what I haven't heard from defense counsel,
15 which would be an easy sentence to say, is was Marcel ever
16 an owner. As an officer of the court I think they should
17 be able to tell us here today was he an owner of the
18 restaurant or not.

19 THE COURT: Well, let me ask defendants,
20 Mr. Grasty, can you provide the ownership information for
21 the six-year statute of limitation period?

22 MR. GRASTY: We've provided a document, your
23 Honor. It is a tax document. I'm not sure why Mr. Pechman
24 believes it doesn't go to ownership, because it says
25 clearly 100% shareholder. We've provided --

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THE COURT: Is that applicable for the entire six-year period?

MR. GRASTY: It is not, your Honor. It --

THE COURT: So I think --

MR. GRASTY: We've provided --

THE COURT: == I think it would be important to demonstrate that for the entire six-year period, who had the ownership interest. So plaintiff is at least entitled to know who was the owner during the six-year period. So you should provide documents demonstrating that. And so that's one; there needs to be production of who owned it.

The other question that I have is we have a settlement conference coming up. And are defendants going to make any claim of financial hardship in connection with paying out any settlement?

MR. GRASTY: It would depend on where the finances end up in this, your Honor, but I don't anticipate one. There might be an issue of liquidity.

THE COURT: Because if there's any claim of financial hardship in terms of paying a settlement or paying out a settlement, you need to provide the tax information, including tax information and resources of the individual defendants.

MR. GRASTY: Yes, your Honor. Let me clarify.

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2 What I wanted to explain is it might be an issue of
3 liquidity. For instance, Paul Denamiel is the owner of the
4 Brownstone Building in which the restaurant exists. And
5 there's been testimony he's the 100% owner of that
6 building. It's valued into the seven figures. It would be
7 enough to pay off the judgment, but there is the liquidity
8 issue of how do you apply that.

9 THE COURT: Okay. Have you provided -- but he may
10 have other resources from which he can fund a settlement.
11 Also, he can take out a loan on any equity he has in
12 property, in real property. So that can -- I don't know
13 that there's a liquidity issue in terms of funding as
14 settlement. But plaintiffs are entitled to understand what
15 the financial situation is to pay any settlement.

16 MR. GRASTY: Okay, they have not pushed us on
17 the -- I don't think they've made requests that I'm aware
18 of.

19 THE COURT: Okay. And in terms of the testimony
20 of the plaintiffs, did the plaintiffs testify that Marcel
21 was involved in conversations about tips and discipline
22 during the six-year period?

23 MR. GRASTY: There was one conversation about tips
24 that he was involved in. There's no testimony or any other
25 evidence that he was involved in discipline. In fact, they

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were each asked at length about those issues, and they said no, they couldn't name anything. Mr. Pechman, I'm sorry, just made a misrepresentation when he said that Marcel hired people and that they testified that he hired people. That's not true. They testified --

MR. PECHMAN: I said he hired all the plaintiffs. That's clear, correct?

MR. GRASTY: No, it's not. That's actually a misrepresentation, too. And I would ask that you go back and perhaps read the transcripts because what it says is that he interviewed them, he interviewed the plaintiffs, all of whom were hired between, I think, 10 and 22 years ago, your Honor, so, again, well beyond the statutory period. And even if he did interview them, which is not what we're conceding at all, it's not relevant.

MR. PECHMAN: And if I just might be heard just for a moment?

THE COURT: Sure.

MR. PECHMAN: To us it's critical in terms of the story, all right, that Marcel owned the place, okay, and his staff remained the same. It's a significant fact. And it's a significant fact that could be disclosed by defendants with a minimal amount of effort, and that is, let's see what the purchase and sale documents were, let's

1 see what the documents were from 2003 in terms of the
2 ownership. And so for us it's more than just going back
3 within the six-year statute of limitations; this is
4 essential to what's the story. Marcel holds him out, even
5 last year in a French newspaper, you know, he's pointed out
6 as the owner; he's on the website as the boss; he's out
7 there in public as the owner. And here, when he comes into
8 court, it's going to be, "I know nothing, I see nothing,
9 I'm just a doddering old fool that likes to hang out at the
10 restaurant for 60 hours a week." With respect to employer
11 status, the fact that, yes, he was the owner; yes, he was
12 50% owner; yes, it's just a matter of his compensation. Of
13 course, whether somebody's an employer, it doesn't matter
14 if they get paid, if they don't get paid; it's one of those
15 factors. And those factors continued in terms of him
16 assigning and in terms of him hiring, in terms of him
17 having all the attributes of an employer under the
18 standards of FLSA legal law.

20 THE COURT: Well, what I've heard is that there's
21 a dispute as to whether there were actually any individuals
22 hired by him during the statute of limitations period. And
23 similarly, I've heard that there's a dispute as to whether
24 he disciplined anyone during the statute of limitations
25 period. What I heard is the only indicia of management

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authority he exercised is this discussion regarding the tip within the six-year period.

But putting that aside, will defendants stipulate that Marcel was an owner at some time, a 50% owner, and transferred that interest to his son on such-and-such a date?

MR. GRASTY: No, your Honor, we cannot do that.

THE COURT: Why not?

MR. GRASTY: Because both Marcel and Paul have testified that he was never an owner.

THE COURT: Oh, okay.

MR. PECHMAN: May I follow-up?

THE COURT: Yes.

MR. PECHMAN: That's exactly why we need the documents. That's why we need the corporate records. Okay?

Now, coincidentally, Friday afternoon we received a response from a FOIA request to the New York State Liquor Authority. Okay? And we're following it up because we're not getting any cooperation from defendants. So this is what we get Friday afternoon from the New York State Liquor Authority. On the application from 1997, when Marcel and Paul, as we understand it from their accountant, were the 50-50 purchasers of the restaurant from Marcel's brother,

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2 what does that liquor license say? It says Marcel is the
3 president of the corporation, and Paul is the vice-
4 president of the corporation. Even more glaring, it says
5 who's managing the restaurant, Marcel. Oh, well, what do
6 you know? Marcel was the 50% owner, and he was the
7 manager. He wasn't a doddering old fool, according to what
8 defendants have submitted to the New York State Liquor
9 Authority.

10 THE COURT: I'm going to require defendants to
11 produce the ownership information for the period -- the
12 statute of limitations period to the extent you haven't
13 produced it for that entire period. I'd like you to
14 provide defendants with a copy of what you got from the
15 liquor licensing bureau.

16 We have a settlement conference --

17 MR. PECHMAN: Judge, I --

18 THE COURT: -- coming up, and what I'd like to do
19 is I don't think there should be discovery right now,
20 before the settlement conference. I think we should go to
21 the settlement conference and see if this matter can be
22 resolved. And then I may allow you to reopen a deposition
23 for limited purposes. How long do you think you need, an
24 hour?

25 MR. PECHMAN: Well, I would say an hour would be

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2 sufficient. But, your Honor, I think what's critical, a
3 corporation has corporate records. I haven't heard from
4 them that their corporate records show something different.
5 Unless things were burned in a fire, they should have the
6 same liquor license, right? I mean, the heart and soul of
7 the restaurant. It's not like this is something that
8 should be a surprise. It's not like the certificate of
9 incorporation or the corporate records are unavailable.
10 There has to be some --

11 THE COURT: Well, where is the certificate of
12 incorporation, don't you have that?

13 MR. GRASTY: We -- but I don't believe we've been
14 asked for that.

15 THE COURT: Okay, well, provide the certificate
16 of incorporation to the plaintiffs.

17 MR. PECHMAN: But, Judge, what we would ask your
18 Honor, respectfully -- and it's not a burden but for us
19 it's critical -- from 1997 to present, the corporate
20 records, whether it's 20 pages or so. Let them make copies
21 of it. There has to be a transfer-of-ownership document;
22 there has to be something which says that Marcel is the
23 president. I don't want to be in -- and it shouldn't be a
24 situation where we're giving defendants discovery about
25 their corporation. It's absurd.

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THE COURT: Well, what I'm asking them -- what I'm directing the defendants to do is to provide the certificate of incorporation and any filings with the state in terms of the corporate structure; and to the extent there were any amendments to that, provide that and also produce the tax forms for all years in the statute of limitations period. Depending on what the corporate records say and the certificate of incorporation, then there may be additional documents that I require you to produce.

MR. PECHMAN: Your Honor, respectfully, just to be clear, the certificate of incorporation might not have what the ownership interest is. If you -- and this is not a burdensome thing --

THE COURT: Well, it should say who are the owners and who are the directors and officers of the company.

MR. PECHMAN: And if it doesn't?

THE COURT: Well, I believe that's required as part of the filing with the secretary of state. So why don't you take a look at that, and then we'll deal with it, if necessary, after the settlement conference, which is, I believe, on Friday, if I'm not mistaken.

Has plaintiff already made a demand?

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MR. PECHMAN: Yes, your Honor.

THE COURT: Okay. Have you responded?

MS. JANE JACOBS: No, we just received it.

THE COURT: You just received the demand. Okay.

MR. GRASTY: We received it on Friday.

THE COURT: Okay. So what I'd like you to do is make a response. And we're going to see if we can get to a resolution. The parties have been litigating this very vigorously, and I want you to focus on potential compromise for Friday. If you can get this documentation to the plaintiffs before Friday, that would be helpful. And on Friday, if you don't settle, then to the extent there needs to be additional documentation or another hour of deposition, we'll address it at that time.

Yes?

MR. GRASTY: Yes, thank you, your Honor. There's one thing I wanted to address, which was in our opposition to plaintiffs' motion, we raised the fact that we had our own discovery issues that we wanted to raise. It sounds like what I'm hearing from your Honor is that you want us to hold off on doing that until after Friday's conference, is that --

THE COURT: Yes, correct.

MR. GRASTY: Okay.

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2 THE COURT: I'd like you to focus on coming
3 together for a compromise on Friday, and let's see if we
4 can get a compromise resolution, because it's clear that
5 there's potential briefing and a potential trial. And it's
6 going to be in everybody's best interest to try to resolve
7 this as amicably as possible on Friday. So I'm going to
8 try to help you do that. But what I'd like is a focus on
9 getting to a potential resolution, and then we'll deal with
10 the discovery afterwards. So if there needs to be
11 additional time or whatever, we'll deal with it at that
12 time, if we need to.

13 MR. GRASTY: And a time frame for us to submit our
14 own motion, I'm assuming?

15 THE COURT: Yes.

16 MR. GRASTY: Thank you.

17 MR. PECHMAN: And, your Honor, just for it to
18 bookmark, we have a couple of other items, if we're going
19 to be fleshing everything out.

20 THE COURT: Yes, so we'll address -- anything that
21 needs to be done; we'll put that together, and whatever
22 time frame you need, we'll get that in place. But what I
23 really want are the parties to think about a resolution.
24 So hopefully we can get to a resolution on Friday. And
25 please come prepared to compromise. Okay?

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MR. PECHMAN: Thank you, Judge.

MR. GRASTY: Thank you.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Halon Drozd, et al. v. 340 West 46th Street Corp., et al., Docket #17-cv-00922-RMB-KHP, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature_____

Carole Ludwig

Date: October 4, 2017